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THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 34,766

EDGAR BOHN,

vs. *Appellant,*

MRS. ELIZABETH WEST BOHN,

Appellee.

Statement of Case.

This suit originated in the Chancery Court of Harrison County by a bill of complaint filed by appellee Mrs. Elizabeth West Bohn, surviving widow of Henry Bohn, deceased, against Edgar Bohn, appellant, one of the children of the said Henry Bohn, to recover from him a large sum of money claimed to be due to her, for the use and occupation of the homestead property of the said decedent, covering a period of something more than ten years. However, the case was transferred to the Circuit Court of Harrison County, Mississippi, which is a law court. The pleadings were reformed to conform to the practice in that court, and were amended in several particulars, so that it proceeded thereafter, as a suit to recover the sum of $10,780. for back rent upon a portion of the homestead property, which appellant had occupied as a store and residence (See T. of R. 45-48).

There was a trial of the cause, and verdict rendered by the jury, in favor of appellee in the sum of $2,250. together with costs (T. of R. 80-81).

Thereafter, the case was appealed to the Supreme Court of the State of Mississippi, and the judgment of the lower court was affirmed, see copy of decision of the court hereto attached. Thereupon, appellant filed elaborate suggestions of errors to this decision, and therein, set up and argued at length and fully, that the decision was contrary to the Fourteenth Amendment to the United States Constitution. However, after due consideration, the suggestion of errors were overruled.

Theory of the Case.

It is considered by appellant that the holding of the court to the effect that the surviving widow of Henry Bohn, deceased, had a life estate in the homestead property, owned and occupied by him at the time of his death, was in violation of the Fourteenth Amendment of the Federal Constitution, in that the life estate of the surviving spouse had been abolished by Section 1170 of the Code of 1880, which is as follows:

> "Dower and curtesy, as heretofore known, are abolished."

In lieu thereof, by Section 1277 of the same code, it was provided:

> "The property exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them, and the children of the decedent, as tenants in common."

The above provision has been brought forward in all subsequent codes of the State, and now appears in the Code of 1930 as Section 1410 thereof. And by Section 1404 of the Code of 1930, which is 1171 of the Code of 1880, it was provided:

> "Where the deceased husband shall leave a child or children by a former marriage, or descendants of said

child or children, his widow shall have a child's part of his estate in fee simple."

Now Section 1765 of the Code of 1930, which is Section 1248 of the Code of 1880, provides that the homestead of a person, being head of a family, actually occupied by him as a residence, and the land and buildings thereon, shall be exempt from sale under execution or attachment. Where it is situated in the country it is not to exceed 160 acres and where it is within a municipal corporation, it is to embrace the property, lot or lots actually occupied, but in either case not to exceed in value, $3000.

By Section 1412 of the Code of 1930, which appears for the first time as Section 1553 in the code of 1892, the surviving widow, is given a veto power over the sale or partition of the homestead property during her life or widowhood.

This is the same power she had while the husband lived, over the sale or encumbrance of the homestead, the exempt property, recognized under the statutes, for many years.

It is therefore the contention of appellant that he has been deprived of a valuable property right contrary to law, which is a violation of the Fourteenth Amendment to the Federal Constitution, in that the decision of the court has re-enacted the old laws of dower and courtesy, which had been abolished by the legislature in 1880; and has substituted these abolished laws in the face of the provisions of Sections 1404-1410 and 1412 of the laws of Mississippi as appears in the code of 1930, which governs this case.

The decision of the court, if permitted to stand, has made appellant liable to appellee for a large sum of money for back rents claimed to be due for the use and occupation of no more than belonged to him by inheritance under the laws quoted, and by purchase from his sister, the sole and

only other child of said decedent, amounting to an undivided two-thirds interest in said property.

In addition to that, the court has ordered appellant to surrender the possession of the property entirely to the widow, which will deprive him of his rightful use of his two-thirds interest in the property. The expectancy of the surviving widow appears to be for a number of years to come. The value of the property itself, as testified to by appellee, is around $12,000.

There were no children of Henry Bohn by his marriage to appellee; there were two children by the former marriage of Henry Bohn, the mother of appellant.

Respectfully submitted,

HANUN F. GARDNER,
J. F. GALLOWAY,
GARDNER, BACKSTROM & GARDNER,
Attorneys for Appellant.

APPENDIX "A".

IN THE SUPREME COURT OF MISSISSIPPI

No. 34,766

(Opinion rendered January 12, 1942.)

In Banc.

EDGAR BOHN

vs.

MRS. ELIZABETH WEST BOHN.

ALEXANDER, *J.*

Appellee is the widow and appellant is the son of H. N. Bohn, deceased. The widow filed her bill to compel an accounting for rents upon such part of the homestead as had been occupied, over her protest, by appellant. The suit was transferred to the circuit court, and the declaration sought reasonable rental of such portion so occupied, and ejectment. A peremptory instruction upon the issue of liability was granted to the widow, and judgment for rents and ejectment was entered upon the verdict of the jury.

The question immediately presented is whether a widow over sixty years of age is entitled to the exclusive use and occupancy of the homestead during her life as against other adult heirs of the deceased owner thereof. Appellant's contention carefully elaborated, that the widow and children inherit in equal parts, the homestead property as tenants in common, needs no support. The narrow inquiry is the extent of the widow's rights therein during her life, or otherwise expressed, the right of the other heirs during this period.

Since the Code of 1892 and under Code of 1930, Sections 1410 and 1412, the widow takes a child's part in the fee with the right of undisturbed possession, or use of the homestead during her lifetime. This change did not re-

strict, but enlarged the rights of the widow. What then is the extent of her rights in the homestead during her life? This inquiry necessarily involves an examination of the rights of the other heirs as tenants in common. Ordinarily, tenants in common are seized *per my et per tout*, and the right of possession is in common. Yet, if the heirs were permitted to exercise their rights of possession as against the homestead, the widow could never enjoy its "undisturbed use and possession." If each was allowed to receive his share of the rents and profits during the life of the widow, she would receive no more than a child's part and Section 1412 would be rendered futile. If the homestead cannot be partitioned during the widow's life, it would be inconsistent to allow the profits or rents from the homestead to be divided. Martin *v.* Martin, 84 Miss. 553, 36 So. 523; Moody *v.* Moody, 86 Miss. 323, 38 So. 322; Stevens *v.* Wilbourn, 88 Miss. 514, 41 So. 66; Miers *v.* Miers, 160 Miss. 746, 133 So. 133.

To what extent must it be undisturbed? In the instant case, involving a two-story homestead property, the appellant, together with his own family, is in possession of the entire lower floor, and part of the second floor. Assuming the existence of equal rights of possession and the presence of adult children, each could make equal claims, attaining results which would pass beyond absurdity into cruelty. Were the home a modest one-room hovel, three children could, by demanding each his respective corner, relegate the widow to the remaining and least desirable nook, there to ponder the havoc wrought through the mockery of a statute which, despite its beneficent assurance, had been found inadequate, to stem the tide of dismemberment. To continue, in the face of this section, to define a common interest in terms of a common right of possession and use is to denude the section of any purpose of efficiency. The plain truth is that the incidents of cotenancy involve disadvantages to which the law was unwilling for the widow to be exposed. Such conclusion is reached not by a strained, but by a literal construction of the benefits and burdens of cotenancy, which appellants insist should still be applied. In adjudging its incompatibility with the purpose of the

section, it should be sufficient to recall that where tenancies in common exist "none knoweth his own severalty and therefore they will occupy promisc-ously" Bl. Com. Vk. 2, ch. 12 p. 191. When it is considered as there stated that in such estate, "no man can certainly tell which part of his own", there would be great hazards that the widow, but for our statute, would enjoy the homestead at the behest of the heirs who could, to an oppressive degree, interfere with the widow's use and enjoyment thereof. Even as the land itself may not be partitioned while she lives, neither may her use thereof be divided.

Through Section 1412 the widow does know her own severalty. Her right to occupy the homestead is definite, and if her benefits and burdens were those of cotenancy, the section need not have been enacted. Since she may occupy the homestead without accounting for rents (Martin *v.* Martin supra), they may not do so. Again, since she is entitled to any rents therefrom Miers *v.* Miers supra), they are liable conversely for their use thereof.

Undisturbed possession must be defined,—not in terms of the forebearance or patience of the widow, but the terms of the legal right not to be subjected to the probability or possibility of a challenged dominion. The widow has the right to retain the homestead as it was during the husband's lifetime, by which test it is seen that she may remain its mistress even as he had been its master. Williams *v.* Williams, 111 Miss. 129, 71 So. 300; Miers *v.* Miers, 160 Miss. 746, 133 So. 133. The matter is not complicated by the fact that the deceased left children. Appellant, an adult business man, in far from necessitous circumstances, having purchased the interest of the sole remaining heir, is alone involved. In the first place, there are no minor or dependent children, and next, the quoted statutes deal not with the duty but with the right of the widow. Wherefore we are not confronted with the necessity of examining to what extent the rights of the appellee are modified, if at all, by any legislative purpose to conserve the property for the maintenance of the family. If, as insisted by appellant, the purpose of the statute was to preserve the homestead for the benefit and protection of the family as therefore, it

is a complete answer that none of the rights therefore existing prior to the husband's death, included the power to eject or disturb the widow or to demand either the homestead or its rentals. If Section 1412 could be so read as to vouchsafe to the heirs, and inch of privilege, it would be powerless to restrain invasion short of the mile of actual ouster. When viewed in the light of its effect upon the right of enjoyment which the statute seeks to conserve for the appellee, there has already been a virtual partition and an actual ouster pro tanto. If, as is seen in Martin *v.* Martin, 84 Miss. 553, 36 So. 523, the "widow cannot be compelled to partite or account for the user so long as it is 'occupied or used' by her", it must follow that others who so use or occupy it may be made to account to her. Since she is entitled to the use or rents therefrom, the use may not be taken by others, even the heirs, without liability for the rents. This construction is not merely forecasted by the following cases, but their obvious import has been accepted by repeated reenactment of Section 1553, Code 1892, Martin *v.* Martin, 84 Miss. 553, 36 So. 523; Moody *v.* Moody, supra; Stevens *v.* Wilbourn, supra; Dickerson *v.* Leslie, 94 Miss. 672, 47 So. 659; Williams *v.* Williams, supra; Tiser *v.* McCain, 113 Miss. 776, 74 So. 660; Miers *v.* Miers, supra; Lackey *v.* Harrington, 162 Miss. 512, 139 So. 313; Medford *v.* Martin, 176 Miss. 188, 168 So. 607. In this connection, Stevens *v.* Wilbourn, supra, is particularly notable in sustaining the right of the widow to an injunction restraining her two adult children from the use and occupation of any part of the homestead.

Many of our cases deal with the immunity of the homestead to sale or disturbance under the claims of creditors. Such charitable protection is dictated by the same consideration which should exempt it from a similar calamity at the hands of the heirs. It is not conceivable that a disruption of the widow's use of the homestead as a haven, or for subsistance, could be less painful or distressing if accomplished at the hands of members of her own family. As stated in Moody *v.* Moody, supra, the rights of the widow are absolute, and "she cannot be called on to account for the use and occupancy, nor forced to purchase the rights of

her co-tenants." The implication is inescapable that the cotenants cannot charge her for her use of the homestead, and one reason why they can neither partition it nor compel her to "buy them off" if because during her lifetime they have no present estate therein to sell. Since they have none, she has all.

The partition prohibited by Section 1412 is not a mere record identification of the several interests therein without any assertion by the co-parceners of their respective rights. It means an actual division of the title with the right of possession thereunder. The extent of the respective interests is fixed by Section 1410. The extent to which such interests may be asserted is listed by Section 1412. The right of the widow has the attributes and incidents of a life estate (Medford *v.* Martin, 176 Miss. 188, 168 So. 607) and the other heirs are vested with a future estate which takes effect in possession at the termination of the preceding estate or interest. 26 A. Jur., "Homestead", Sec. 169, p. 106. The status of cotenancy is recognized, but the usual rights thereunder are made subordinate to the widow's rights of use and occupancy during her life. In line with the purpose of the statute, the immunity from partition, being personal to the widow, is not extended to her grantee. Middleton *v.* Claughton, 77 Miss. 131, 24 So. 963.

Although this is the most important contention presented, we have carefully examined all other assignments of error and find that they are not well taken. The peremptory instructions granted to appellee was proper, and the damage by way of rentals, are not unreasonable.

Affirmed.

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CHARLES ELMORE CRO

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

Appellant,

vs.

MRS. ELIZABETH WEST BOHN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

HANUN GARDNER,
J. F. GALLOWAY,
OSCAR BACKSTROM,
Counsel for Appellant.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

vs. *Appellant,*

MRS. ELIZABETH WEST BOHN,

Appellee.

BRIEF BY APPELLANT ON MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

Statement of Facts.

One Henry Bohn, a resident of the City of Pass Christian, Harrison County, Mississippi, died intestate at his usual place of residence in that city in 1928, and left surviving him, as his legal heirs, two children by a former marriage, and appellee, his surviving widow. Appellant is one of his surviving children, and a short time after death of the father, he bought out the interest of his sister, the other child; there were no children by the second marriage.

Shortly after the death of Henry Bohn, the surviving widow and two children occupied the homestead property together, but using separate parts thereof, according to a common understanding and plan of action, which continued up to the filing of the present suit, initiated in the circuit

court of Harrison County, Mississippi, as an action of ejectment, and involving a claim for accrued rents, claimed to be due the surviving widow, from the date of the death of the husband and father, until payment in full, covering a period of more than ten years, not including rents accruing since filing the suit.

Contentions of the Parties.

Appellees contend, and base their suit on it, that the surviving widow, under the above facts, under the laws of the State of Mississippi, has a life estate in the property involved in this suit, which was occupied by the said Henry Bohn during his lifetime, as his homestead; and therefore, she has the right to the exclusive use and occupation of the property, and its income, rents and profits.

On the other hand, appellant contends, that since the adoption of the Code of 1880 in Mississippi, life estates in the surviving husband or wife were abolished, and, in lieu thereof, they were given the status of tenants in common, with a veto power on the part of the surviving spouse, over the sale or partition of the homestead.

ARGUMENT.

The life estate, which vested in the surviving widow, from the time of the admission of the State of Mississippi into the Union, up to the year 1880, was abolished upon the adoption of Section 1170 of the Code of 1880, which is as follows:

> "Dower and curtesy, as heretofore known, are abolished."

The legislature of the State of Mississippi has never restored the right of dower in the surviving widow, to this date.

The legislature of the State, in 1880, had come to a realization, as had most of the law making powers of the other states of the Union, including lawyers, judges and litigants that the attaching of dower upon the lands of a man by his marriage, was so inconvenient, and in many cases worked such hardship, that it was necessary to adopt different methods entirely.

One of the older lawyers of the state, who had practiced long under the ancient system, after the enactment of Section 1170 of the code of 1880, composed the following obituary:

> "Venerable relics of antiquity, you have come down to us from a former generation. You have survived the wrecks of empires, and change of dynasty. Born way back in the womb of time, whereof the mamory of man runnith not to the contrary, you have outlived the War of Roses, passed safely through the protectorate, crossed the ocean, survived the great American Revolution and rode out the storm of the late great war, like shades, you have followed the bride and groom, twain blended into one. Venerable priests and priestess of the common law, farewell. You have been pleasant in your lives and in death, you have not been divided."

Also, in the case of *Hauer* v. *Davidson,* 113 Miss. 696, 74 So. Rep. 621, the Supreme Court of the State of Mississippi referred to the fact that courtesy and dower had long since been abolished in this state, in the following words:

> "There is no merit in this contention, for the reason that the estate by courtesy was abolished in 1880 prior to the death of Mrs. Branon. On her death, her husband and daughters inherited the land as tenants in common, so that a conveyance thereof by Branon would vest in his grantee, an undivided interest therein."

The Federal Question.

If dower, a life estate in the surviving widow, was abolished by the Mississippi Legislature in 1880, and there has been no act of the Legislature reinvesting the surviving widow with that right, then the action of the Supreme Court in holding that the surviving widow has a life estate in the homestead property of the deceased husband, is unlawful, and has operated to deprive appellant of a valuable right in the homestead property of his father, vested in him under the statutes which have been quoted at length in appellee's brief to dismiss herein, and which statutes are the only laws of the State of Mississippi which are applicable to the matter.

In other words, the vesting, without the benefit of legislature, of a life estate in the surviving widow, in view of said statutes, is a violation of the Fourteenth Amendment to the Federal Constitution, and operates to deprive appellant of his property without due process of law.

It is not a question of the interpretation of the Statutes of the State of Mississippi, but the application of the Statute by the Mississippi Court. This Court, in the case of *Castillo* v. *McConnico*, 168 U. S. 680, and on page 683, clearly draws the distinction:

> "The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the constitution of the United States. The other depends on the law making power of the state, and, as it is solely the result of such authority, may vary or change, as the legislative will of the state see fit to ordain. It follows that to determine the one, due process of law is the final province of this court, while the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the jurisdiction of the state courts of last resort.

When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, *provided always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law*" (Italics ours).

Now the statutes, construed by the Supreme Court of the State of Mississippi, are as follows: (*Code of 1930*)

"1404. *Descent of property as between husband & wife.*—If a husband die intestate, and do not leave children, or descendants of children, his widow shall be entitled to his entire estate, real and personal in fee simple, after payment of his debts; *but where the deceased husband shall leave a child or children by that, or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate, in either case in fee simple.* If a married woman die, owning any real or personal estate, not disposed of, it shall descend to her husband, and her children, or their descendants, if she have any surviving her, either by a former husband or by the surviving husband, in equal parts, according to the rules of descent. And if she have children, and there also be, descendants of other children, who have died before the mother, the descendants shall inherit the share, to which the parent would have been entitled, if living, as co-heirs with the surviving children. But, if she have no children, or descendants of them, then the husband shall inherit all of her property" (Italics ours).

Thus, the children of the deceased, and the surviving spouse, took share and share alike.

"1410. *Descent of exempt property.*—The property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, *descend to the survivor of them, and the children and grandchildren of the decedent, as tenants in common,* grandchildren, inheriting their deceased parent's share, and if there be no children or

grandchildren of the decedent, to the surviving wife or husband, and if there be no such survivor, to the children and grandchildren of the deceased owner; but where the surviving husband or wife, shall own a place of residence equal in value to the homestead of the decedent, and the deceased husband or wife, have not surviving children or grandchildren of the last marriage, but have children or grandchildren of a former marriage, the homestead of such decedent, shall not descend to the surviving husband or wife, but shall descend to the surviving children or grandchildren of the decedent by such former marriage, as other property" (Italics ours).

The property exempted from sale under execution or attachment, is defined: (Code of 1930)

"*1765. Homestead exemption.*—Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold, exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied by him or her, as a residence, but the quantity of land shall not exceed 160 acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of Three Thousand ($3000.00) Dollars, but the husband or wife, widower or widow, over sixty years of age, who has been exemptionist under this section, shall not be deprived of such exemption because of not having a family, or not occupying the homestead."

"*1412. Exempt property not to be partitioned in certain cases.*—Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood, as long as it is occupied and used by the widow unless she consents."

This last section, without otherwise change of the rights of the surviving widow and children of the decedent, thus gave the widow the veto power, *only*, over the sale or par-

tition of the homestead property. And that is the same right that a wife has in Mississippi, over the homestead property during the lifetime of the husband—neither more nor less.

A casual reading of the foregoing statutes, shows that the surviving widow is a tenant in common with the surviving children in the homestead property, and is not the owner of a life estate therein, as the court held.

To hold otherwise, is to judicially legislate an estate of tenancy in common, into an estate for life.

The wrong and inequity of such a misapplication of the statute, will appear from the following illustration, and it is not a fanciful one, or one not likely to happen:

A husband having a child by a former marriage, in late life, marries a young woman. A short time thereafter, he builds a hotel at a cost of three quarters of a million dollars. The husband resides on the property with his second wife, occupying several rooms in the building. The child by the former marriage does not reside with her parent, she has now reached her majority. There is a sort of armed neutrality between the stepmother and the child. Both of them are fond of the father and husband, but are jealous of each other; the wife is of the possessive type, so that there is no possibility of any real friendship between them. The wife is not much older than the child, so that her expectancy is much longer than that of the husband.

The hotel property is valuable and productive of a large revenue. In case of the death of the husband, which must occur in a few years according to the course of nature, the holding of the court will exclude this child from participation in the use and benefits of this most valuable property, unless the widow consents to sale or partition, or dies.

A number of other such conditions will readily appear to the mind of the Court.

Discussing in Detail Objections in Motion to Dismiss.

As to paragraph 1 of the motion.

The Federal question is, as we have hereinbefore stated, the Supreme Court of the State of Mississippi has no authority to convert an estate of tenancy in common, into an estate for life, without depriving appellant of the use of his property, without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

As to paragraph 2 of the motion.

Subsections a-b and c have already been discussed. As to subsection d:

On page 1 of the "Statement of the Case" filed by appellant in his petition for appeal, it is there stated: "The case was appealed to the Supreme Court of the State of Mississippi and the judgment of the lower court was affirmed. Thereupon, appellant filed suggestion of errors to this decision, and argued fully and at length that the decision was contrary to the Fourteenth Amendment to the United States Constitution."

It was set up in the suggestion of errors before the state supreme court:

> "The application given by the court to Section 1410 and 1412 of the Mississippi Code of 1930, has deprived appellant of a valuable right guaranteed by the Fourteenth Amendment to the U. S. Constitution."

And appellant, and counsel for appellant, submitted to the court a brief, containing thirteen pages on that point alone, reviewing the law and the authorities thereon.

As to subsection g, to the effect that appellant's statement filed in connection with the application for appeal,

did not contain a copy of the opinion of the court below. Counsel for appellees are mistaken, as will be readily seen in the transcript of the record filed in this Court.

As to paragraph 3 of the motion.

The assignment to the effect that appellant failed to serve appellees with the notice required by paragraph 2 of rule 12, directing attention to paragraph 3 of rule 12:

Counsel for appellee are mistaken as to this again, as will more fully appear from the transcript of the record herein, and also from a copy of said notice, which was served upon counsel for appellees the same day that the petition for appeal, statement of the case, copy of order of the court granting the appeal, and bond etc., were served upon them, jointly and severally. Attached to this brief is copy of this notice calling attention to the rule referred to, as Exhibit "A" hereto.

As to paragraph 4 of the motion.

The appeal in this case was perfected within the ninety day period, provided for by the statutes, Section 350, Title 28, U. S. Code Annotated. In fact the appeal was perfected in one-third of that time, and as speedily as it could be done under all of the circumstances.

The petition for appeal and all other necessary papers had been prepared, within a short time after the decision in the state court, but the making of the bond and its approval required about ten days.

It is therefore submitted that appellant has been reasonably diligent, no injury has been done, and he has only exercised the right conferred upon him by the statute aforesaid.

As to paragraph 5 of the motion.

The bond for appeal, with supersedeas, has been approved by Chief Justice Sydney Smith of the Supreme Court of the State of Mississippi, and is in due and regular form.

The bond is entirely sufficient in every respect, otherwise Judge Smith would not have approved it, but if deemed insufficient by this Court, appellant will be glad to make it satisfactory.

As to paragraph 6 of the motion.

This is upon the assignment that the appeal is prosecuted by appellant solely for the purposes of delay.

This statement is purely gratuitous.

We have prosecuted this appeal only after considerable deliberation, and with the confident belief that the decision of the Mississippi Supreme Court should be reversed; and that the Federal Constitution will protect appellant in his rights of property in this case.

Respectfully submitted,

HANUN GARDNER,
Counsel for Appellant.

J. F. GALLOWAY,
OSCAR BACKSTROM,
Of Counsel.

EXHIBIT "A".

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JAMES F. GALLOWAY

Lawyer,

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Gulfport, Miss.

March 18, 1942.

Messrs. Thompson & Mize,
Jo Drake Arrington,
Attorneys,
Gulfport, Miss.

RE: Bohn vs. Bohn #34,766
Docket Mississippi Supreme Court

GENTLEMEN:

In connection with the above matter, I beg to call your attention to Sub Section 3 paragraph 12 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939 as amended March 25, 1940, October 21, 1940 and May 26, 1941.

Yours very truly,

(Signed) J. F. GALLOWAY.

JFG:kg.

STATE OF MISSISSIPPI,
County of Harrison:

This day personally appeared before me, the undersigned authority in and for the said county and state, the undersigned, J. F. Galloway, who being by me duly sworn deposes and says that on March 18, 1942, he mailed to Messrs. Thompson & Mize and Jo Drake Arrington, attorneys of record for appellee, postage prepaid, addressed to said attorneys at their place of residence, usual abode and place

of business at Gulfport, Mississippi, with return address on the envelope in case of non-delivery. That said letter, or notice, has not been returned to your affiant.

J. F. GALLOWAY,
Affiant.

Sworn to and subscribed before me this the 9th day of April, A. D. 1942.

[Seal Chancery Court of Harrison County, Mississippi.]

C. J. DARBY,
Chancery Clerk,
By L. H. WILLIAMS,
D. C.

FILE COPY

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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

Appellant,

vs.

MRS. ELIZABETH WEST BOHN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

WEBB M. MIZE,
Counsel for Appellee.

J. D. ARRINGTON,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

Appellant,

vs.

MRS. ELIZABETH WEST BOHN,

Appellee.

STATEMENT OF APPELLEE OPPOSING JURISDICTION.

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1. This suit is in ejectment, and for the collection of rents. A declaration (R. 45-48) was filed in the Circuit Court of Harrison County, Mississippi, by Mrs. Elizabeth West Bohn, the widow of H. N. Bohn, deceased. The appellee at the time of the filing of her declaration was more than sixty years of age. Appellee's right to the exclusive use of the property rested on Sections 1404, 1410, 1412, and 1765 of the Mississippi Code of 1930. These sections are as follows:

> "1404. Descent of property as between husband and wife.—If a husband die intestate, and do not leave children or descendants of children, his widow shall be en-

titled to his entire estate, real and personal, in fee-simple, after payment of his debts; but where the deceased husband shall leave a child or children, by that or a former marriage, or descendants of such child or children, his widow shall have a child's part of his estate, in either case in fee simple. If a married woman die, owning any real or personal estate not disposed of, it shall descend to her husband, and her children or their descendants if she have any surviving her, either by a former husband or by the surviving husband, in equal parts, according to the rules of descent. And if she have children, and there also be descendants of other children who have died before the mother, the descendants shall inherit the share to which the parent would have been entitled if living, as coheirs with the surviving children. But if she have no children or descendants of them, then the husband shall inherit all of her property."

(Mississippi Code of 1930—pages 728-729.)

"1410. Descent of exempt property.—The property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them, and the children and grandchildren of the descedent, as tenants in common, grandchildren inheriting their deceased parent's share, and if there be no children or grandchildren of the decedent, to the surviving wife or husband, and if there be no such survivor to the children and grandchildren of the deceased owner; but where the surviving husband or wife shall own a place of residence equal in value to the homestead of the decedent, and the deceased husband or wife have not surviving children or grandchildren of the last marriage, but have children or grandchildren of a former marriage, the homestead of such decedent shall not descend to the surviving husband or wife, but shall descend to the surviving children and grandchildren of the decedent by such former marriage as other property."

(Mississippi Code of 1930—page 731.)

"1412. Exempt property not to be partitioned in certain cases.—Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood, as long as it is occupied or used by the widow, unless she consent.

(Mississippi Code of 1930—page 732.)

"1765. Homestead exemption—certain persons over sixty years not required to occupy or have family.—Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him or her, but the quantity of land shall not exceed one hundred and sixty acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of three thousand dollars. But husband or wife, widower or widow, over sixty years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not having family or not occupying the homestead."

(Mississippi Code of 1930—page 866.)

2. The property involved was the homestead of the appellee and her late husband. The appellant is the adult son of H. N. Bohn, deceased, by a former marriage. The appellee's position in the lower court was that she had a life estate in the property and was entitled to the exclusive use and occupancy of the homestead during her widowhood.

3. To the declaration in the State Circuit Court, the appellant filed a demurrer which brought up no Federal ground but was based on the theory that both parties to the suit were tenants in common, and therefore ejectment would not lie (R. 51-52). The demurrer was overruled, and a plea of the general issue was filed (R. 54), and notice was given under the general issue to the effect that H. N. Bohn,

during his lifetime, did not designate or file for record a homestead declaration. A special plea was filed alleging an agreement for the appellant's occupancy of the property. A second special plea was filed pleading limitation of action. A third special plea was filed likewise pleading limitation of action. Replications were filed to the pleas and issue was joined, and the case proceeded to the taking of testimony, at the conclusion of which the Circuit Court instructed the jury to find for the plaintiff and gave numerous instructions and refused certain instructions requested by the appellant. None of these instructions and none of the pleadings raised any Federal question whatever. The jury returned a verdict for the sum of Two Thousand Two Hundred and Fifty ($2,250.00) Dollars in favor of the appellee, and judgment was rendered by the said Circuit Court in favor of the appellee in the sum of Two Thousand Two Hundred and Fifty ($2,250.00) Dollars for rents, and for possession of the premises.

4. In said Circuit Court the appellant filed a motion for a new trial, which motion was overruled. Thereupon, the case was appealed to the Supreme Court of the State of Mississippi. The assignment of errors in the Mississippi Supreme Court raised no federal question and no constitutional question. In fact, the validity and constitutionality of the statutes involved were not questioned.

5. The judgment of the Circuit Court was affirmed by written opinion of the Supreme Court of the State of Mississippi. A suggestion of error was filed, which suggestion of error asserted that "the application given by the court to Sections 1410 and 1412 of the Mississippi Code of 1930 deprives appellant of a valuable right guaranteed by the 14th Amendment to the United States' Constitution". The question of the validity or constitutionality of the

statutes involved has never yet been raised in this cause, and, in the assignment of errors to this Court, the validity or the constitutionality of the statutes involved is not raised; and there is no federal question whatever in this cause.

6. The assignment of errors filed in this Court, taken in its most favorable light for the benefit of appellant, merely states that the Supreme Court of the State of Mississippi misapplied the statutory law of the State of Mississippi, and in so misapplying it, violated the 14th Amendment to the Constitution of the United States. It should be noted also that the assignment of errors does not state in what manner the appellant was deprived of any property rights guaranteed by the 14th Amendment.

7. The Record shows that an appeal was allowed by the Supreme Court of the State of Mississippi to this Court on March 18th, 1942. But it also shows that on March 14th, 1942, or four days previously, the Clerk of the Mississippi Supreme Court issued its Mandate to the Circuit Court of Harrison County, Mississippi, and that the costs of the appeal were paid, and that the Mandate was filed in the Circuit Court of Harrison County, Mississippi, on March 16th, 1942, two days before the appeal was allowed, and the Supreme Court of Mississippi thereby lost all jurisdiction after its Mandate had been executed and sent to the lower court and before the appeal to this Court. A certificate of the Clerk of the Circuit Court of Harrison County, Mississippi, is annexed hereto and marked Exhibit "A" hereto.

8. The bond in this cause is insufficient. No notice was given to the appellee of the application for this appeal, and no opportunity given to appellee to object to the sufficiency of the bond. The bond is not sufficient to cover the judgment. The judgment was in the sum of Two Thousand

Two Hundred and Fifty ($2,250.00) Dollars; five per cent (5%) damages for taking an appeal allowed by the Mississippi Law amounts to One Hundred Twelve Dollars and Fifty Cents ($112.50); interest on the judgment at the rate of six per cent (6%) makes the judgment for a still larger amount. In addition to this, the judgment of the court is likewise for possession of the homestead property, and the taking of this appeal has deprived the appellee of the use of her property (a valuable right), and the appeal has prevented her from taking possession of it.

9. This appeal was sued out merely for delay, and under Rule 30 of this Court, ten per cent (10%) additional damages should be allowed appellee. Likewise, costs have to be paid, and the bond is insufficient.

10. Furthermore, Rule 12 of the Rules of the Supreme Court of the United States has not been complied with. Appellant's statement does not refer to any statutory provision believed to sustain jurisdiction. It does not refer to any statute of the State, statute or treaty of the United States, the validity of which is involved. It does not include a statement of grounds upon which it is contended that the questions involved are substantial. It does not specify the stage in the proceedings in the court of first instance or in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised. (They are attempted to be raised here for the first time.) Appellant does not refer to the method of raising any federal question, nor does he show the manner in which they were raised by the court, nor does appellant refer to any specific portions of the Record where any such matter appears. Appellant did not direct appellee's attention to the provisions of paragraph (2) of Rule 12.

Appellee therefore respectfully submits that this Court has no jurisdiction of this appeal and that the appeal should be dismissed or the judgment below affirmed; and appellee files herewith a Motion to Dismiss or Affirm.

Respectfully submitted,

WEBB M. MIZE,
Attorney for Appellee.

Of Counsel:
J. DRAKE ARRINGTON,
R. W. THOMPSON, JR.

EXHIBIT "A".

STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, hereby certify that in the case of Elizabeth West Bohn versus Edgar Bohn, No. 10,691, which was appealed to the Supreme Court of the State of Mississippi from the Circuit Court of Harrison County, Mississippi, and finally determined in said Supreme Court of Mississippi, was certified back to me by the Clerk of the Supreme Court of the State of Mississippi, by Mandate, including copy of judgment rendered by said Supreme Court, together with copy of opinion of said Court in said cause, and I further certify that said Mandate was issued on the 14th day of March, 1942, and was filed in my office on the 16th day of March, 1942, and I further certify that the terms of the Mandate have been partially executed as of this date, as costs of appeal to the Supreme Court of Mississippi have been fully paid.

Given under my hand and official seal of said Court hereto affixed, on this 30th day of March, 1942.

[SEAL.] A. J. RAMSAY,
Clerk Circuit Court, Harrison County, Mississippi.

Certificate to Signature of Clerk.—See Sec. 905, Revised Statutes U. S.

THE STATE OF MISSISSIPPI:

I, L. C. Corban, sole presiding Judge of the Second Judicial Circuit Court District, of the State of Mississippi (said District including the County of Harrison) do hereby certify that A. J. Ramsay, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the Clerk of the Circuit Court of Harrison County, in said State, duly elected and qualified, and that his said attestation is in due form.

Witness my signature, this the 30th day of March, A. D. 1942.

[SEAL.]

L. C. CORBAN,
Judge.

Certificate of Clerk to Signature. See Sec. 906, Revised Statutes U. S.

THE STATE OF MISSISSIPPI,
Harrison County:

I, the undersigned Clerk of the Circuit Court of the County of Harrison, in said State (said Court being a court of record, and having an official seal), do hereby certify that L. C. Corban, whose genuine signature appears to the annexed and foregoing attestation, is now, and was at the date thereof, the sole presiding Judge of the Second Judicial Circuit Court District of said State, which said District includes the said County of Harrison, and that said L. C. Corban, as aforesaid, is now, and was at the date of said attestation, duly commissioned and qualified.

Given under my hand and seal of office, at Gulfport, Mississippi, this the 30th day of March, A. D. 1942.

[SEAL.]

A. J. RAMSAY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1212

EDGAR BOHN,

Appellant,

vs.

MRS. ELIZABETH WEST BOHN,

Appellee.

MOTION TO DISMISS APPEAL OR AFFIRM.

And now comes the appellee and moves the Court to dismiss or affirm the appeal for the following reasons, to-wit:

1. The Statement of the Case and Assignment of Errors filed in this Court fail to show any jurisdiction in this Court to review the judgment or decree of the Mississippi Supreme Court.

   a. There is no federal question involved.

   b. The Statement does not refer to any statutory provisions believed or alleged to have sustained jurisdiction.

2. The Statement of the Case and proceedings filed in connection therewith are in violation of the Rules of the United States Supreme Court.

   a. The Statement fails to refer to the statutory provision believed to sustain the jurisdiction.

b. The Statement fails to refer to the statute of the State, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions.

c. The Statement does not include a statement of the grounds upon which it is contended the questions involved are substantial.

d. The Statement fails to specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised.

e. The Statement fails to show the method of raising them or the manner in which they were passed upon by the court.

f. The Statement fails to make any pertinent quotation or specify portions of the Record, or a summary thereof, with specific reference to the places in the Record where the matter appears, as will support the assertions that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court, and cited no cases in support thereof.

g. The Statement fails to attach the judgment or decree of the Mississippi Supreme Court sought to be reviewed.

h. The appellant has failed to serve appellee with a statement as required by paragraph (2) of Rule 12 directing attention to paragraph (3) of Rule 12.

All of which are in violation of Rule 12, paragraphs (1), (2) and (3).

3. The proceedings filed herein show conclusively upon their face that the judgment or decree of the Mississippi

Supreme Court was based upon a non-Federal ground adequate to support it.

a. The Statement shows conclusively that no federal question was raised or involved in the Circuit Court of Harrison County, Mississippi and none in the Supreme Court of the State of Mississippi.

b. The Assignment of Errors from the Circuit Court of Harrison County, Mississippi to the Supreme Court of the State of Mississippi assigned no error of a federal nature.

c. The Supreme Court of Mississippi merely construed a statute of the State, the validity or constitutionality of which statute is not challenged.

d. The construction of a State's statute by its Supreme Court in determining the meaning and application of such statute is binding upon the United States Supreme Court.

e. The appellant, if he had a right to review (which we deny), has a right only by certiorari.

4. The Mississippi Supreme Court was without authority to grant an appeal for the reason that its Mandate had been returned to the court of original jurisdiction (the Circuit Court of Harrison County, Mississippi) prior to the date an appeal was allowed and (as shown by the certificate of the Clerk of the Circuit Court of Harrison County, Mississippi, certified to under the Acts of Congress, and annexed to appellee's Statement in opposition) had been partially executed when the appeal was taken.

a. The Clerk's certificate attached to appellee's Statement must be given full faith and credit.

b. The United States Supreme Court will not undertake to review a decision of the State Court when the Mandate has been returned to the lower court and partially or completely carried into effect.

5. The supersedeas bond given and approved for this appeal is not sufficient in amount and as to its provisions to adequately protect appellee and is in violation of the Rules of this Court, and particularly Rule 36, paragraph (2).

a. There is no provision in said bond permitting compensation or indemnity to appellee for delay.

b. The amount is not sufficient to discharge the judgment of the Mississippi Supreme Court and the costs incident to this appeal and such damages as may be awarded by this Court.

6. The proceedings herein show that this appeal is prosecuted by the appellant solely for the purpose of delay.

Therefore, for the above reasons, we respectfully submit that this appeal should be dismissed or the judgment of the Mississippi Supreme Court affirmed.

Respectfully submitted,

WEBB M. MIZE,
Attorney for Appellee.

Of Counsel:

R. W. THOMPSON, JR.,
J. DRAKE ARRINGTON.

No. 1212. BOHN *v.* BOHN. Appeal from the Supreme Court of Mississippi. May 25, 1942. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a federal question. Under Rule 30 (2), dam-

ages of 10 percent of the amount of the judgment are awarded, it appearing that the appeal was frivolous and taken merely for delay. *Mr. Hanun Gardner* for appellant. *Mr. Webb M. Mize* for appellee. Reported below: 5 So. 2d 429.